STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2003
v	No. 233863 Oakland Circuit Court
QUINCY NORMAN STEWART, Defendant-Appellant.	LC No. 00-174687-FC

Before: Hoekstra, P.J., and Smolenski and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and sentenced to a term of ten to twenty years' imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises from the robbery of Anthony's pizza and party store. The complainant was a cashier at the store on the night of the robbery. Although there were two other people working, the others hid in a locked office during the incident and the complainant was the only person in the front of the store. The complainant was facing away from the door and was making a submarine sandwich when she heard the door open. She believed that a customer had entered and, when she turned around, there was "a gun in [her] face." The person holding the gun was not wearing a mask; he had distinct features, "slanted, slanty eyes."

The complainant closed her eyes and heard the store door open again as if someone else was entering. The other two employees, who were hiding, heard the voice of a second man. The complainant was scared and nervous, and testified that defendant behaved in a threatening manner, swearing at her throughout the incident. At one point, defendant held the gun to the back of her head. The complainant kept her eyes closed as much as possible during the robbery, in the belief that defendant would be more likely to shoot her if he thought she could recognize him, but she got two clear looks at his face during the robbery. One of the complainant's co-workers watched through a hole in the locked office door as the complainant was taken past the office; the co-worker armed herself with a knife in case she needed to protect herself. After the robbery, it was discovered that $980 had been taken from the store register, and the complainant's purse was also missing.

The complainant was shown two photo show-ups after the incident. The first photo show-up did not contain defendant's picture and the complainant did not identify anyone. Defendant's picture was included in the second photo show-up and the complainant identified

him as the assailant "pretty instantaneous[ly]." At trial, the complainant identified defendant as the man holding the gun. The parties stipulated that defendant wore braces at the time of the robbery; the complainant did not mention braces in her description of the robber.

Defendant presented expert testimony that eyewitness identification is unreliable, particularly when, as here, the assailant has a gun and is a member of a different race. Also, two alibi witnesses testified that defendant was with them at a get-together on the evening of the robbery. On recross-examination, one of the witnesses testified that the get-together they attended with defendant was on a Friday night. The robbery occurred on a Wednesday.

On appeal, defendant first argues that he was denied his right to present evidence in support of his defense when the trial court refused to allow the testimony of a witness who spoke to an unidentified man after the robbery. The man, who did not give his name, told the potential witness that he saw two men run out of the store "wearing masks." Although defendant argues that the trial court erred in ruling that this proffered testimony was inadmissible hearsay, the record reveals that defense counsel conceded that there was no basis to admit the testimony and asked that the witness be excused. In light of counsel's affirmative concession, this issue has been waived, thereby extinguishing any error, and we need not address it. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001).

Defendant also argues that he was denied a fair trial because of the prosecutor's improper remarks during closing argument. Prosecutorial misconduct issues are decided case by case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). This Court considers the alleged misconduct in context to determine whether it denied the defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Here, however, defendant did not object to the prosecutor's remarks below. Reversal will not be granted where an issue is not preserved absent a plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Error requiring reversal will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Schutte, supra*.

A prosecutor is afforded great latitude in closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Even improper remarks do not require reversal when they are of a responsive nature. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

First, defendant challenges the prosecutor's statements that the evidence showed that defendant was guilty and that the police officer at the second photo show-up testified that complainant's identification of defendant was confident and positive. There is no merit to defendant's claim. A prosecutor may draw inferences from the testimony and may argue that a witness, including the defendant, is not worthy of belief. *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985). The prosecutor is not required to use the "blandest possible terms" to state his inferences and conclusions. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecutor may use strong and emotional language in making his argument so long as it is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Here, the prosecutor did not express his personal belief in defendant's guilt, but properly argued that the evidence established that defendant was guilty. We find no plain error.

Defendant also contends that the prosecutor's remarks that the defense attorney "tried to manufacture reasonable doubt" with the defense witnesses improperly denigrated defense counsel. Read in context, the challenged remark, which was made during rebuttal, was a response to the defense argument that its expert witness had cast doubt on the complainant's eyewitness identification. The prosecutor did not personally attack defense counsel or shift the jury's focus from the evidence to defense counsel's personality, and defendant was not denied a fair trial on this basis. *People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996).

Defendant also challenges the prosecutor's statement that he had expected defendant's alibi witnesses to come in to court to lie for defendant. It is not improper for a prosecutor to argue that a witness is not worthy of belief. *Buckey, supra* at 14-15. The statement did not constitute plain error.

Finally, defendant challenges the prosecutor's query questioning why the other people who allegedly attended the get-together with defendant, and could have provided defendant with an alibi, did not testify. Defendant suggests that this remark improperly shifted the burden of proof. There is no merit to this claim. Where, as here, a defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). The prosecutor's argument therefore did not constitute plain error.

Defendant next argues that he is entitled to resentencing because offense variables (OV) 1, 2 and 9 of the sentencing guidelines were improperly scored. We disagree. This Court reviews scoring decisions to determine whether the trial court's scoring of the guidelines was supported by the evidence. *People v Leversee*, 243 Mich App 337, 348-349; 622 NW2d 325 (2000).

Defendant did not object to the scoring of OV 1 (aggravated use of a weapon) or OV 2 (lethal potential of the weapon). MCL 777.31; MCL 777.32. A party may not challenge the accuracy of a sentencing guidelines score unless the issue is raised "at or before sentencing" or as soon thereafter "as the inaccuracy could reasonably have been discovered." MCR 6.429(C). Unpreserved issues are reviewed for plain error affecting a defendant's substantial rights. *Carines, supra*.

The complainant testified that defendant pointed a gun at her, which she described as "a handgun, dark grey [sic]. It looked somewhat like an officer's gun, semi-automatic." Defendant received 15 points for OV 1, which provides that fifteen points are to be scored if a firearm was pointed at or toward a victim. MCL 777.31(1). Defendant also received five points for OV 2, which provides for a score of five points if the offender possessed a pistol. MCL 777.32(1). The complainant's testimony that defendant pointed a semi-automatic handgun at her, along with her description of the weapon, supports the trial court's scoring of OV 1 and OV 2. *Leversee, supra*. We find no merit to defendant's argument, presented for the first time on appeal, that the court improperly scored OV 1 and OV 2 because there was no evidence that the object identified by the complainant as a "gun" qualified as a firearm under MCL 8.3t.

Defendant also challenges the trial court's scoring of OV 9 (number of victims). MCL 777.39. Defendant raised this issue below and, therefore, it is preserved. The instructions for OV 9 provide that "each person who was placed in danger of injury or loss of life" is to be

counted as a victim, and defendant was scored ten points for "2 to 9 victims." MCL 777.39(1)(c) and (2)(a). The trial court found that the complainant's two co-workers, who remained hidden throughout the robbery, had also been placed in danger and should be counted as victims. The trial court reasoned:

> [A]lthough those two people maybe didn't come face-to-face with the Defendant, only one person in that office and that building had a gun. And they were huddled down on the floor in a little office just hoping and praying that no one was gonna come in and shoot them. And I think they felt very much in danger, very frightened[,] and I think this [is] squarely what the Variable talks about.

The evidence at trial indicated that the complainant's two co-workers heard the robbery over the store intercom and turned out the office light and locked the door; they knew that defendant had a gun and were afraid he would enter the office and find them. Defendant came within a few feet of the co-workers during the course of the robbery, and one of them armed herself with a knife in an attempt to protect herself in the event he came in. The trial court's score of ten points for OV 9 is supported by the evidence. *Leversee, supra.*

Finally, we have considered the additional issues of ineffective assistance of trial and appellate counsel raised in defendant's pro per Standard 11 supplemental brief. After review, we find them to be without merit.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski
/s/ Karen Fort Hood